

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

SHARIE OWENS,

Defendant-Appellant.

UNPUBLISHED

April 20, 2010

No. 288668

Wayne Circuit Court

LC No. 07-021216-FC

Before: MARKEY, P.J., and ZAHRA and GLEICHER, JJ.

PER CURIAM.

Defendant appeals by right her jury-trial convictions of second-degree murder,¹ MCL 750.317, and possession of a firearm during the commission of a felony, MCL 750.227b(1). The trial court sentenced her to 25 to 45 years imprisonment to be served consecutively to two years' imprisonment for the felony-firearm conviction. We affirm.

Defendant was convicted of fatally shooting her boyfriend during an argument. Evidence revealed that the victim was shot four times while inside defendant's house. He had multiple abrasions and lacerations on his face and neck, but he had no offensive or defensive wounds on his hands or arms that would indicate a struggle. Some of the facial injuries were non-hemorrhagic, indicating that they were inflicted shortly after the victim died. The victim had a high blood-alcohol level when he died. The police were not contacted until several hours after the victim died. When the police arrived at defendant's house, they observed the victim's body lying on the floor by the front door, but there were no signs of a struggle. Defendant's brother and sister had never seen defendant carry a gun, and defendant's brother did not feel a gun when he wrestled with defendant earlier on the day of the shooting.

Defendant testified that she shot the victim in self-defense. She explained that the two of them got into an argument that evolved into a physical fight. According to defendant, the victim at one point produced a gun and pointed it at her, but she was able to knock it out of his hand. The two of them then began fighting, during which she kicked, punched, and scratched him, and during which the victim threatened to kill defendant and her child. Defendant explained that she

¹ Defendant was originally charged with first-degree premeditated murder, MCL 750.316(1)(a).

saw the gun on the floor, picked it up, and shot the victim. According to defendant, the victim was laughing, again threatened to kill her, and began coming after her, so she shot him again. He still tried to come after her after that, so she shot him yet again. Defendant admitted shooting the victim three or four times. Although defendant believed that the victim was dead, she did not immediately contact the police. She eventually drove to the police station to report what happened. But she appeared disoriented when she arrived, and it took her approximately 40 minutes to disclose what happened.

The jury rejected defendant's claim of self-defense. Although it acquitted her of first-degree premeditated murder, it convicted her of the lesser offense of second-degree murder.

I. Sufficiency of the Evidence

Defendant argues that there was insufficient evidence to disprove her claim of self-defense, and insufficient evidence to support her conviction of second-degree murder. She also argues that there was insufficient evidence of premeditation to submit that charge to the jury.

The sufficiency of the evidence is evaluated by reviewing the evidence in the light most favorable to the prosecution to determine whether a rational trier of fact could find every element of the crime proven beyond a reasonable doubt. *People v Hampton*, 407 Mich 354, 368; 285 NW2d 284 (1979). The resolution of credibility disputes is within the exclusive province of the trier of fact. *People v Wolfe*, 440 Mich 508, 514-515; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992). Thus, this Court is required to review the sufficiency of the evidence with deference by making all reasonable inferences and resolving credibility conflicts in favor of the jury verdict. *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000).

A. Self-Defense

One's killing another person in self-defense is justifiable homicide if, "under all the circumstances, he honestly and reasonably believes that he is in imminent danger of death or great bodily harm and that it is necessary for him to exercise deadly force." *People v Riddle*, 467 Mich 116, 119; 649 NW2d 30 (2002); see also *People v Heflin*, 434 Mich 482, 502; 456 NW2d 10 (1990). "Once evidence of self-defense is introduced, the prosecutor bears the burden of disproving it beyond a reasonable doubt." *People v Fortson*, 202 Mich App 13, 20; 507 NW2d 763 (1993).

An actor is normally required to try to avoid the use of deadly force by, for example, applying nondeadly force, or utilizing an obvious and safe avenue of retreat. *Riddle*, 467 Mich at 119. But, a person is "*never* required to retreat from a sudden, fierce, and violent attack; nor is [s]he required to retreat from an attacker who [s]he reasonably believes is about to use a deadly weapon." *Id.* at 119 (emphasis in the original). Instead, "[s]he may stand [her] ground and meet force with force." *Id.* The same is true when a person is attacked inside [her] own dwelling. *Id.* at 120-121. But a nonaggressor who voluntarily participates in mutual combat will not be justified in using deadly force until she has retreated as far as safely possible. *Id.* at 120.

Evidence was presented that the victim was intoxicated to such a degree that he was barely able to stand up. Although defendant claimed that she and the victim were involved in a physical struggle, no signs of a struggle were observed inside defendant's house, and the victim

did not have any offensive or defensive injuries on his hands or arms. Defendant also was uninjured. Moreover, witnesses denied that the victim carried a gun. Viewed in a light most favorable to the prosecution, a reasonable jury could have found beyond a reasonable doubt that defendant's self-defense claim was not credible.

Furthermore, even accepting defendant's testimony that the victim produced a gun, defendant testified that she knocked the gun out of the victim's hand, and he did not try to pick it up. Instead, she attacked him, fought with him, and pushed him to the ground. Defendant then picked up the gun and shot him. The jury could have found that the victim did not pose an imminent threat of death or great bodily harm to defendant after she recovered the gun, particularly considering the victim's intoxicated state. Moreover, a reasonable jury could have found defendant's testimony that the victim continued to come after her after she shot him the first and second times was not credible considering the nature of the victim's gunshot wounds. In sum, the evidence was sufficient to enable the jury to reject defendant's self-defense claim beyond a reasonable doubt.

B. Second-Degree Murder

To convict a defendant of second-degree murder, the prosecutor must prove beyond a reasonable doubt: "(1) a death, (2) caused by an act of the defendant, (3) with malice, and (4) without justification or excuse." *People v Goecke*, 457 Mich 442, 463-464; 579 NW2d 868 (1998). Malice is defined as the intent to kill, the intent to cause great bodily harm, or the wilful and wanton disregard of the likelihood that the natural tendency of one's actions will be to cause death or great bodily harm. *Id.* at 464. Malice may be inferred from the facts and circumstances of the crime, including the use of a deadly weapon, *People v Carines*, 460 Mich 750, 759; 597 NW2d 130 (1999), or the nature and location of a victim's wounds, *People v Unger*, 278 Mich App 210, 231; 749 NW2d 272 (2008).

In this case, it is undisputed that the victim died from multiple gunshot wounds. Evidence that defendant shot the victim four times, once in the abdomen, twice in the chest, and once in the head, was sufficient to support a finding of malice. To the extent that defendant argues that the evidence was insufficient to identify her as the person who killed the victim, we find no merit to this argument. The victim was found dead in defendant's apartment, along with an unloaded gun, a spent bullet, and a spent casing. Defendant tested positive for gunshot residue on her hands and face, and had the victim's blood on her hair and clothes. Further, defendant testified at trial and admitted that she shot the victim. Viewed in a light most favorable to the prosecution, the evidence was sufficient to support defendant's conviction of second-degree murder.

C. Premeditation and Deliberation

Defendant argues that the prosecution failed to present sufficient evidence of premeditation to justify submitting the first-degree murder charge to the jury. We disagree.

In *People v Graves*, 458 Mich 476, 488; 581 NW2d 229 (1998), our Supreme Court overruled *People v Vail*, 393 Mich 460, 464; 227 NW2d 535 (1975), which had held that prejudice is presumed when a jury is permitted to consider a greater charge that is unwarranted by the evidence. Rather, a jury is presumed to follow instructions not to compromise, and a

defendant has no basis to object if she is acquitted of an unwarranted charge, but convicted of a charge properly supported by the proofs. *Graves*, 458 Mich at 486-487. To be entitled to reversal based on the jury's consideration of an unwarranted higher charge, a defendant must show persuasive indicia of jury compromise, such as logically irreconcilable verdicts, a clear record of unresolved jury confusion, or "where a defendant is convicted of the next-lesser offense after the improperly submitted greater offense." *Id.* at 487-488.

To convict a defendant of first-degree premeditated murder, the prosecution must prove that the defendant acted with premeditation and deliberation. *People v Anderson*, 209 Mich App 527, 537; 531 NW2d 780 (1995). "To premeditate is to think about beforehand; to deliberate is to measure and evaluate the major facets of a choice or problem." *People v Furman*, 158 Mich App 302, 308; 404 NW2d 246 (1987). Both "characterize a thought process undisturbed by hot blood." *Id.* "Premeditation and deliberation require sufficient time to allow the defendant to take a second look." *Anderson*, 209 Mich App at 537. Premeditation may be inferred from all the facts and circumstances, including the relationship between the parties, the circumstances of the killing itself, and defendant's conduct before and after the murder. *Id.*; *Furman*, 158 Mich App at 308. Premeditation can also be inferred from the type of weapon used and the location of the wounds. *People v Berry (On Remand)*, 198 Mich App 123, 128; 497 NW2d 202 (1993).

As discussed previously, the evidence in this case supported an inference that the victim was so intoxicated that he was barely able to stand. There was no evidence of a struggle in defendant's house, and the victim had no offensive or defensive injuries on his arms and hands. Although defendant claimed that the victim had a gun, she stated that she knocked it out of his hand and he did not try to pick it up. Defendant, however, pushed the victim over and picked up the gun. Even accepting defendant's testimony that it was the victim who produced the gun, viewing the evidence in the light most favorable to the prosecution, a reasonable jury could have found that after defendant disarmed the victim and acquired control of the gun, she had an opportunity to consider her planned course of action, i.e., to take a "second look," before firing the first shot. Further, the jury could have inferred from defendant's own testimony that after she shot the victim the first time, she had additional time to measure and evaluate her actions before shooting him again. Also, defendant did not check to see if the victim was dead, or call for help. She disposed of all but one of the spent casings and waited approximately four hours before driving to the police station. She then delayed another 40 minutes before disclosing what happened. Viewed in a light most favorable to the prosecution, a reasonable jury could have found from the evidence that defendant acted with premeditation when she shot the victim and then delayed reporting the victim's death to make sure he was dead. There was sufficient evidence of premeditation and deliberation to submit the first-degree murder charge to the jury.

II. Prosecutorial Misconduct

Defendant next argues that the prosecutor engaged in misconduct when he warned the jury during closing argument to beware of false claims of domestic violence, such as defendant's. Because defendant did not object to the prosecutor's comment, this issue is not preserved. Therefore, the burden is on defendant to show a plain error affecting her substantial rights. *People v Ackerman*, 257 Mich App 434, 448-449; 669 NW2d 818 (2003).

We review claims of prosecutorial misconduct on a case-by-case basis, viewing the challenged remarks in context to determine whether the defendant was deprived of a fair trial.

People v Noble, 238 Mich App 647, 660; 608 NW2d 123 (1999). A prosecutor may not advocate the jury convict on the basis of their civic duty. *Ackerman*, 257 Mich App at 452. It is also improper for the prosecutor to inject issues broader than a defendant's guilt or innocence. *People v Rice (On Remand)*, 235 Mich App 429, 438; 597 NW2d 843 (1999). However, a prosecutor is free to comment on the evidence and reasonable inferences drawn from the evidence. *People v Cox*, 268 Mich App 440, 451; 709 NW2d 152 (2005). The use of passionate language, by itself, is not improper, *Ackerman*, 257 Mich App at 454, and a prosecutor need not phrase his arguments in the blandest possible terms, *Cox*, 268 Mich App at 451.

During closing argument, the prosecutor addressed defendant's claim of self-defense and noted that while defendant claimed that she acted in fear of death or great bodily harm, she could not explain why all (but one) of the shots entered defendant's right side, why she was uninjured, or why she waited five hours before going to the police. Also, defendant did not ask anyone to document her injuries; there were no signs of struggle at the scene, and the victim's injuries were inconsistent with the struggle that defendant described. The prosecutor argued that the shooting did not happen in the way defendant described, and that defendant was not acting in self-defense. The prosecutor added:

And I would caution you, ladies and gentlemen, seriously caution you; beware of the false claim of domestic violence. That's something to be taken very seriously. Because when somebody comes in and makes a claim of domestic violence that did not happen, they're minimizing the ones that are really telling the truth. That's what she's doing. She's trying to hitch her wagon to that train and ride it all the way out of here.

Ladies and gentlemen, it's your job to make sure she doesn't do that because you know beyond a reasonable doubt that yes, she was the one that killed [the victim]. Yes, she did it under circumstances that were not self-defense. And yes, she did it under circumstances that indicate, based on all the evidence, based on the cluster of three wounds to the body, one to the head[,] that she intended this to happen.

I don't know why. I wish I could tell you. But you took an oath to follow the law. And the law says that I don't have to tell you why. I can't tell you why. I wish I could. I really do. But you don't need to know why something happened in order to say that it did.

Viewed in context, the prosecutor properly commented on the evidence and inferences drawn from the evidence to argue that the offense did not occur in the manner that defendant described, and to argue that defendant's claim that she was a victim of domestic violence was false. To the extent that the prosecutor injected an issue broader than defendant's guilt or innocence by urging the jury not to allow defendant to undermine legitimate claims of domestic violence, reversal is not warranted because a curative instruction could have cured any prejudice. *Noble*, 238 Mich App at 660. Indeed, the trial court instructed the jury not to allow sympathy or prejudice to influence its decision, that it was to decide the case according to the law and the properly admitted evidence, and that the attorneys' statements and arguments are not evidence. The court's instructions were sufficient to protect defendant's substantial rights.

III. Effective Assistance of Counsel

Defendant next argues that defense counsel was ineffective for failing to introduce her entire custodial statement under the rule of completeness, MRE 106, after the prosecutor introduced portions. We disagree.

Defendant did not raise an ineffective assistance of counsel claim in the trial court and this Court denied defendant's motion to remand. Therefore, this Court's review is limited to mistakes apparent on the record. *People v Davis*, 250 Mich App 357, 368; 649 NW2d 94 (2002). To establish ineffective assistance of counsel, "a defendant must show that counsel's performance fell below an objective standard of reasonableness, and that the representation so prejudiced the defendant as to deprive him of a fair trial." *People v Pickens*, 446 Mich 298, 303; 521 NW2d 797 (1994). Defendant must overcome the presumption that the challenged conduct might be considered sound trial strategy and must further show that he was prejudiced by the error in question. *People v Rodgers*, 248 Mich App 702, 714-715; 645 NW2d 294 (2001). To establish prejudice, defendant must show a reasonable probability that but for counsel's error, the outcome would have been different. *Id.* at 714.

"Decisions concerning what evidence to present and whether to call or question a witness are presumed to be matters of trial strategy, and this Court will not substitute its judgment for that of counsel regarding matters of trial strategy." *Davis*, 250 Mich App at 368. To overcome the presumption of sound trial strategy, defendant must show that counsel's alleged error may have made a difference in the outcome by, for example, depriving her of a substantial defense. See *People v Payne*, 285 Mich App 181, 190; 774 NW2d 714 (2009).

At trial, the trial court sustained the prosecutor's objection to defendant's attempt to question a police officer regarding defendant's oral statements because MRE 801(d)(2) only permitted the prosecutor to introduce party admissions. The prosecutor later introduced portions of defendant's statement to impeach her trial testimony. Defendant argues that defense counsel could have successfully persuaded the trial court to admit other parts of defendant's oral statement had counsel argued that MRE 106 required its admission. We disagree.

MRE 106 provides: "When a writing or recorded statement or part thereof is introduced by a party, an adverse party may require the introduction at that time of any other part or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it." By its plain terms, MRE 106 applies only to written or recorded, not oral statements. Counsel is not required to raise futile arguments. *Rodgers*, 248 Mich App at 715.

Moreover, defendant cannot establish the alleged error resulted in prejudice because she was able to present her version of the events when she testified at trial in support of her self-defense claim. *Rodgers*, 248 Mich App at 714. Accordingly, defendant has failed to show that counsel's alleged error deprived her of a substantial defense. *Payne*, 285 Mich App at 190.

IV. Cumulative Effect of Errors

Defendant lastly argues that apart from her challenges to the sufficiency of the evidence, the cumulative effect of the other errors in this case deprived her of a fair trial. "The cumulative effect of several minor errors may warrant reversal where the individual errors would not."

Ackerman, 257 Mich App at 454. In this case, defendant's assertions of error have no merit. Thus, there can be no cumulative effect that might have denied defendant a fair trial. *Id.*

We affirm.

/s/ Jane E. Markey

/s/ Brian K. Zahra

/s/ Elizabeth L. Gleicher